appropriate. The Court considers such requested $80 rate to be excessive in light of the circumstances present here. A basic responsiblity of a lawyer is to provide the Court with evidence in support of the position being taken by the party represented. In the present fee proceeding, the Court has found, in agreement with the plaintiff's position, that she was involuntarily transferred from the BIDO Director job and that the restoration of her authority was influenced by the filing of this lawsuit, but the Court was not favored with any evidence from her attorney on which to base these findings. Nevertheless, the Court will allow a rate of $75 an hour.

The plaintiff's local counsel (Charles Cleveland, Esquire, of Birmingham, Alabama) has 7 hours in connection with the plaintiff's fee petition hearing, and 3 hours consisted of the fee petition hearing. It would be unfair to the EEOC to include the 4 hours for his becoming familiar with the case on the eve of the hearing, because that was duplicative of the process in which the plaintiff's lead counsel had already engaged. It may as a practical matter have been a necessary duplication in that plaintiff's lead counsel did not attend the hearing, but the

hearing had already been postponed once in order to accommodate plaintiff's lead counsel, and the circumstance that he was unable to attend the rescheduled hearing, requiring a duplication of work by plaintiff's local counsel, should not be charged against the EEOC. To place the monetary burden of that duplication on the EEOC would be inequitable. The Court will therefore allow, with respect to plaintiff's local counsel, 3 hours at an hourly rate of $75 for his attendance at the attorneys' fee hearing.

No upward or downward adjustment is sought with respect to the fees for services in connection with the fee petition, and the Court finds that neither upward nor downward adjustment is appropriate. No expenses or costs are sought by the plaintiff in connection with the fee petition.[10]

In summary, then, the Court finds that the plaintiff is entitled, under Section 706(k) of Title VII,[11] to an award against the EEOC of attorneys' fees and costs as follows:

Services in connection with the institution of the lawsuit: 6 hours at $75 per hour = $450

Services in connection with the fee petition: 3 hours lead counsel time at $75 per hour ($225) and 3 hours local counsel time at $75 per hour ($225) = $450

Total fee award = $900

Costs = 43.96

Total = $943.96

DONE this 13th day of February 1981.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

Footnotes

1. Plaintiff's motion for reconsideration of the denial of the petition was denied by the Court of Appeals on December 29, 1980.

2. 13 Wright and Miller, Federal Practice & Procedure §3541 et seq.

3. The plaintiff objected to certain passages in the Court's 1978 decision relative to the showing of the evidence as to actions by plaintiff.

4. The term "presented" is used because it appears the pleading was not filed with the Clerk of the Court and seems instead to have been taken directly to Judge Pointer.

5. Bertram Perry v. Alvin Golub et als, Civil Action No. 75-G-1476-S (herein referred to as the Perry case (sometimes referred to as "the Falkowski case") in which defendant Lowell Perry was the then Chairperson of the EEOC. Lowell Perry is no relation to Bertram Perry, who is the plaintiff in the Perry case. Bertram Perry was not a party to the Falkowski case.

6. It should be noted that the undersigned Judge was not involved in any of those proceedings and has acquired knowledge of the events set forth above through a review of the Court records in the Clerk's office.

7. The one exception consisted of the possibility that the complaint might be interpreted as having reference to the attempted reassignment of the plaintiff in1975. That possibility itself was later shown to be non-existent since the 1975 "detail" reassignment expired.

8. The plaintiff also had an Alabama attorney as local counsel at the time. At the hearing on November 26, 1980, the Court allowed the plaintiff a period of time (long since expired) within which to file with the Court a listing of the attorney services and time for which a fee award was sought, but no listing was filed with respect to her then local counsel. The Court therefore cannot include any time he may have had in connection with the filing of the lawsuit in the award.

9. It may be assumed the intended reference was to the preparation of plaintiff's motion for a TRO since Judge Pointer treated it as a motion for preliminary injunction and denied it.

10. The expense items sought by the plaintiff were incurred subsequent to the resto-

ration of her authority on May 3, 1976 or were incurred in connection with her former status as a defendant in the Perry case, neither of which can be allowed because she cannot be regarded as a prevailing party in those respects.

11. Since it is undisputed that such fee entitlement as plaintiff might receive may be based on Section 706(k) of Title VII, there is no need to consider entitlement under the Civil Rights Attorneys' Fees Awards Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Filed 4/17/81
Entered 4/17/81

BERTRAM PERRY,

Plaintiff,

v.

EVELYN FALKOWSKI, et al.,

Defendants

CIVIL ACTION NO.: CV78-PT-0935-S

MEMORANDUM OPINION

This cause comes on to be heard on various pending motions; all of which were set for hearing on December 22, 1980 and were orally argued by the parties. The court has granted vaious requests by defendant Falkowski for extensions of time to file briefs, proposals, etc.

PAST PROCEEDINGS

The history of this case presents a long, sad tale. It is particularly sad since it involves employees of a Commission created by Congress to assist in precluding discriminatory employment practices and to do this by obtaining "conciliation" agreements where possible. It is not the purpose or prerogative of this court at this juncture to

determine fault. However, it is apparent that the various proceedings involving the Birmingham District Office of the Equal Employment Opportunity Commission, which began at least as early as 1975, reflect unfavorably on the motives of one or more of the Commission employees. These same employees are often involved in considering the motives of private employers. It is particularly sad, whoever might be the villain and the victim, that each of the principal characters belongs to a group that EEOC was commssioned to protect. In any event, these proceedings and the underlying matters have not served the public interest.

The court does not intend to recount nor attempt to decipher the morass that has resulted to date. The proceedings involve at least two cases in this district court with accompanying appeals to the Fifth Circuit Court of Appeals and at least one petition for certiorari to th United States Supreme Court. Presumably, there have been countless hours spent in the intra-agency hearings and harangues. At least one agency appeal is still pending. The whole situation is made even sadder by the knowledge that as the result of these intra-department antics,

the U. S. Government has been ordered to pay $99,331.90 in attorney fees, Perry v. Golub, 75-G-1476-S, N. D. of Ala. (1980). [Pet.App. A]. In fairness to Mr. Perry and Ms. Falkowski, the court will say that, to date, apparently no court or agency has ever determined, on the merits, the fault of any party or the actual facts of any issue.

This court feels that its present task is to only consider the procedural issues which are presently before the court and rule on them without being influenced by the past proceedings. In fairness to Ms. Falkowski, the court will say that Ms. Falkowski has earnestly argued that she should have the opportunity to vindicate herself. With all due deference to Ms. Falkowski's position, the court cannot convert a legal proceeding into a forum for such purpose. It should suffice, for all who have a sincere interest, that Ms. Falkowski has never previously been heard on the merits.

PRESENT PROCEEDING

The primary matters now before the court are plaintiff's Motion for Voluntary Dismissal filed November 19, 1980 and Falkowski's Motion for Leave to File Counterclaims filed November 20, 1980. Defendant Norton does not oppose plaintiff's Motion for Voluntary Dis-

missal. Defendant Falkowski vigorously opposes it.

In order to consider whether to grant plaintiff's Motion to Dismiss, the court must first consider Falkowski's Motion for Leave to File Counterclaims. The original complaint in this case was filed on August 24, 1978. Various motions, attorney withdrawals, etc. have been filed. Defendant Falkowski filed an answer to the amended complaint on February 7, 1979. No counterclaim was filed at that time. The proceedings were stayed by Chief Judge McFadden until the Fifth Circuit Court of Appeals entered its decision in the case of Perry v. Golub, supra. The case was reassigned to the undersigned on June 25, 1980. This court immediately began to schedule pretrial conferences. Plaintiff requested continuances because of an illness and ultimately moved for the voluntary dismissal. This was immediately followed by defendant Falkowski's Motion for Leave to File Counterclaims.

Defendant Falkowski's putative counterclaims can be categorized as follows:

(1) A claim under U.S.C. §1981 and the First and Fifth Amendments for conduct by the plaintiff designed to deprive her of

her right to be employed by EEOC.

(2) A claim for abuse of process in filing the instant action;

(3) A claim of defamation without allegations as to dates, language, manner of publication, or other specific matters; and

(4) A claim of conspiracy beginning in 1975 under 42 U.S.C. §1985.

Federal Rule of Civil Procedure 13(a) provides that: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party . . . ." Rule 13(f) provides that: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." Defendant Falkowski has made no effort to show why her neglect in failing to originaly file a counterclaim was excusable. Under the circumstances, this alone could be reason enough to deny her motion. Furthermore, the court doubts that any of the alleged counterclaims would withstand proper motions and defenses. The discrimination claim under 42 U.S.C. §1981 and the First and Fifth Amendments does not state a cause

of action. Title VII is "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Brown v GSA, 425 U.S. 820, 829 (1976). Newbold v. U. S. Postal Service, 614 F.2d 46, 47 (5th Cir. 1980).

The claim for abuse of process would appear to be an effort to avoid pleading one of the essential elements of a malicious prosecution action; i.e. termination of the action favorably to the claimant. The difference between a claim for abuse of process and a claim for malicious prosecution is that the former rests upon the improper use of a regularly issued process, while the latter has reference to the wrong in the issuance thereof. Clikos v. Long, 231 Ala. 424, 165 So. 394 (1936). No claim has been stated for abuse of process.

The purported defamation claim is made in a totally conclusory fashion. Furthermore, jurisdiction is claimed under 28 U.S.C. §1331. The court cannot deetermine that such a claim arises under the "Constitution, laws or treaties of the United States."

The claim under 42 U.S.C. §1985 is not allowable for the same reasons stated above with regard to the claim under 42 U.S.C. §1981. Brown v. GSA and Newbold v. U. S. Postal Service, supra.

The court concludes, all matters considered, that plaintiff's motion to voluntarily dismiss the complaint should be granted and that defendant Falkowski's motion for leave to file counterclaims should be denied. Although plaintiff originally requested to dismiss his action without prejudice, he agreed, at the oral hearing and later filed an amended motion, that the dismissal could be with prejudice as to his action. The court will enter a separate order dismissing plaintiff's action with prejudice and denying defendant Falkowski's motion for leave to file counterclaims, without prejudice to the right of Falkowski to proceed with administrative hearings or to file separate actions.

This the 16th day of April, 1981.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Filed and
Entered
July 22, 1981

| | | |
|---|---|---|
| BERTRAM PERRY, | ) | |
| | ) | |
| Plaintiff | ) | |
| v. | ) | |
| | ) | Civil Action No.: |
| EVELYN FALKOWSKI, et. al., | ) | CV 78-PT-0935-S |
| | ) | |
| Defendant | ) | |

ORDER

This cause comes on to be heard on defendant Evelyn Falkowski's motion for an Award of Attorneys' Fees and to Amend. Oral argument was heard on said motion June 18, 1981; the court has additionally reviewed the material submitted in support of and in opposition to said motion.

There is no statutory basis for awarding attorneys fees to a prevailing defendant as to some of the claims which plaintiff made in his original complaint. Additionally, with respect to plaintiff's claim for which defendant might be entitled to recover under 42 U.S.C. §1988, the court cannot find that the claims were groundless, unreasonable,

meritless, vexatious, frivolous, oppressive, or that they were brought in bad faith or without foundation. Accordingly, it is ORDERED that defendant Falkowski's Motion for an Award of Attorney's Fees and to Amend be, and the same hereby is, DENIED.

This Order is not intended to suggest, in any way, which of the two parties was at fault in the despicable circumstances which led to this case.

DONE AND ORDERED this 22 day of July, 1981.

/s/ ROBERT B. PROPST

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX E

[COMMITTEE PRINT]

95TH CONGRESS
2d Session

SENATE

# JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS

---

## STAFF REPORT

TO THE

## SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

## COMMITTEE ON THE JUDICIARY

OF THE

## UNITED STATES SENATE

MAY 1978

Printed for the use of the Committee on the Judiciary

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U.S. GOVERNMENT PRINTING OFFICE
21-221 O WASHINGTON : 1978

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

(4) Alterations in the procedures for selecting private counsel, including advertising and the establishment of criteria and a selection committee;

(5) A re-drafting of the Attorney General's January 31, 1977 representation guidelines to specifically include additional standards;

(6) Use of initial client interviews where the potential for conflicts of interest arise.

This study was prepared by the Representation Committee of the General Litigation Section, Civil Division, comprising Dennis G. Linder, Assistant Chief and committee chairman, John T. Boese, Robert J. Franzinger, and R. John Seibert, in consultation with David J. Anderson, Chief, General Litigation Section, Barbara B. O'Malley, Assistant Chief, Jeffrey Axelrad, Chief, Information and Privacy Section, and J. Roger Edgar, Chief, Frauds Section.

## I.

## INTRODUCTION

### 1. The Representation Function Of The Department Of Justice.

From the Department's earliest days, it has been consistently recognized that for both equitable and prudential reasons, the Department has an obligation to represent federal employees sued for conduct performed in the lawful exercise of their duties. Over a century ago, Attorney General Jeremiah Black declared:

> When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason, it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws. [9 OAG 51 (1857)].

Legislative Branch (McSurely v. McClellan, 521 F.2d 1024 (C.A.D.C. 1975)); (2) suits against federal judges (Garfield v. Palmieri, 297 F.2d 526 (C.A. 2 1962)); (3) issuance of a press release (Barr v. Matteo, supra); (4) institution of administrative proceedings (Economou v. U.S. Dept. of Agriculture, 535 F.2d 688 (C.A. 2 1976), cert. granted, ____ U.S. L.W. ____; (5) medical treatment by a military doctor (Henderson v. Bluemink, 511 F.2d 399 (C.A.D.C. 1974); (6) sending notices of tax levies (David v. Cohen, 407 F.2d 1268 (CADC 1969)); (7) the sending of a letter expressing views as to a company's capabilities (Expeditions Unlimited v. Smithsonian Institution, et al., ____ F.2d ____ (CADC June 28, 1976) pending on rehearing en banc; and (8) activities of federal law enforcement and intelligence collection agencies brought against government employees (See Appendix A for examples).

A. Existing Conflicts.

As a result of the unprecedented disclosures in recent years of apparent misconduct by government officials, and the aforementioned decrease in the availability of absolute immunity, there has been a burgeoning growth of personal damage actions against current and former federal employees. As might be expected, this litigation has brought the Department a steadily increasing number of requests from the sued employees for direct Departmental representation in both their official and individual capacities. */ At present, approximately nine cases handled by the General Litigation Section raise serious representational problems due to two recurrent situations: (1) material conflicts or inconsistencies in the recollections of pertinent facts among individually sued government defendants (hereinafter referred to as "inter-defendant conflicts"), and (2) allegations of conduct on the part of the individual government defendants which are also the subject of pending federal criminal investigations being undertaken by the Civil Rights and the Criminal Divisions. **/

*/ The Department has always represented all government employees sued in their official capacities as mandated by its statutory responsibility under 28 U.S.C. § 516.

**/ The pertinent criminal investigations include the CIA mail opening investigation conducted by the Criminal Division and now concluded with a decision by the Attorney General not to prosecute; the FBI break-in investigation conducted by the Civil Rights Division and still in progress; and the examination of NSA electronic interception of international communications conducted by the Criminal Division, also still pending.

Secretary of State
Henry A. Kissinger
Richard G. Kleindienst
Richard Helms
Charles N. Colson
John W. Dean, III
L. Patrick Gray, III
Egil Krogh, Jr.
Robert C. Mardian
Richard M. Nixon
H.R. Haldeman
John D. Ehrlichman
Jeb Stuart Magruder
Herbert W. Kalmbach
David R. Young
John J. Caulfield
Anthony T. Vlasewicz
E. Howard Hunt
G. Gordon Liddy
James W. McCord, Jr.

This is an action filed in September 1976 by columnist Jack Anderson against the heads of four Federal agencies and the FBI, as well as twenty individual defendants associated with the Nixon Administration for alleged deprivation of the plaintiff's constitutional rights to freedom of the press, privacy, and freedom from warrantless searches and seizures. A variety of improper conduct is alleged, including harassment and unlawful physical and electronic surveillance.

Five defendants are sued in their official capacities, and the Department will, of course, represent them directly. The remaining defendants are sued individually. It is too early to predict with any certainty how many private counsel will be needed. To date, one attorney has been retained to represent fromer Attorney General Mitchell, and the Department has offered to retain another attorney to represent former President Nixon, Mr. Haldeman and Mr. Ehrlichman. The face of the complaint suggests that inter-defendant conflicts may arise in the course of the litigations. If the individual defendants should request our representation, and if they should be in conflict regarding the plaintiff's allegations, then, based upon current Department policy, consideration would be given to retaining private counsel.

APPENDIX D

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 77-1719

---

BERTRAM N. PERRY,
*Plaintiff-Appellee,*

*v.*

ALVIN GOLUB, ET AL.,
*Defendants-Appellees,*

EVELYN FALKOWSKI,
*Movant-Appellant.*

---

No. 77-1865

---

EVELYN FALKOWSKI,
*Plaintiff-Appellant*
*Cross-Appellee,*

*v.*

LOWELL PERRY, Chairman, ETC., ET AL.,
*Defendants-Appellees*
*Cross-Appellants.*

---

Appeals from the United States District Court
for the Northern District of Alabama

---

(April 25, 1979)

Before WISDOM, CLARK and FAY, Circuit Judges.

PER CURIAM:

The district court correctly dismissed these actions without prejudice on account of mootness. The effect of such dismissals was to vacate all underlying proceedings in each case so as to spawn no consequences. The adjudication of mootness eliminated all pending controversies and left the court without jurisdiction to enter those portions of the injunction orders restricting future actions of the parties in either case. The orders of dismissal, without prejudice, are affirmed but the "protective orders" or injunctions are vacated.

AFFIRMED and VACATED.

---

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 26
Norman E. Zoller
Clerk

No. 81-7278

BERTRAM PERRY,

Plaintiff-Appellee,

versus

ALVIN GOLUB, et al,

Defendants-Appellees,

EVELYN FALKOWSKI,

Defendant-Appellant.

**********

EVELYN FALKOWSKI,

Plaintiff-Appellant,

versus

LOWELL PERRY, etc., et al,

Defendants-Appellees.

**********

No. 81-7643

BERTRAM N. PERRY,

Plaintiff-Appellee,

versus

EVELYN FALKOWSKI, etc.

Defendant-Appellant.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 25, , 11 Cir. 1982 F.2d )

JANUARY 26, 1983

PER CURIAM:

( x) The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rhearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

(X) The Petition for Rehearing is DENIED...

( ) A member of the Court in active service...

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON

UNITED STATES CIRCUIT JUDGE

*U.S. District Judge for Northern District of Alabama, sitting by designation

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 81-7278

BERTRAM PERRY,

Plaintiff-Appellee,

v.

ALVIN GOLUB, ET. AL.

Defendants-Appellees,

EVELYN FALKOWSKI, Defendant-Appellant

**********

EVELYN FALKOWSKI, Plaintiff-Appellant,

v.

LOWELL PERRY, ETC., ET. AL.

Defendants-Appellees.

**********

No. 81-7643

BERTRAM N. PERRY,

Plaintiff-Appellee,

v.

EVELYN FALKOWSKI, ETC.

Defendant-Appellant.

---

Appeals from the United States District Court for the Northern District of Alabama

---

(October 25, 1982)

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM

*Honorable Clarence W. Allgood, U.S. District Judg for the Northern District of Alabama, sitting by designation.

With respect to No. 81-7643, the judgment ment of the district court denying appellant Falkowski's claim for attorney's fees as a prevailing defendant is AFFIRMED. See Local Rule 25.

In No. 81-7278, there are two separate actions consolidated for appeal. The first involves the appeal by Falkowski from the district court's award of attorney's fees to her for the period April 19, 1976, to May 3, 1976. After carefully reviewing the record and the arguments raised by appellant Falkowski, we conclude that Falkowski's arguments are without merit. We therefore AFFIRM the judgment of the district court with respect to appellant Falkowski.

The second matter before us in No. 81-7278 relates to the award of attorney's fees to Bertram Perry for the period beginning with his filing of the Perry v. Golub suit and continuing up to the hearing on Perry's request for attorney's fees. The EEOC has appealed this award, challenging both the statutory basis for the award as well as the period with respect to which Perry is entitled to attorneys fees. Although the question is a close one, we decline to disturb the finding of the district court that the Title VII elements of this case provide

a statutory basis for an award of attorney's fees. Perry's success in obtaining a preliminatry injunction in the district court and the EEOC's withdrawal of its plans to transfer Perry are sufficient to make Perry a "prevailing party." However, prior opinions of the former Fifth Circuit in this case have held that the case became moot due to the voluntary actions of the EEOC on May 3, 1976. Therefore, any award of attorney's fees for services performed in this litigation ater May 3, 1976, is improper. Taylor v. Sterrett, 640 F. 2d 663, 667 (5th Cir. 1981). The district court on remand shall determine the proper amount for that period. Accordingly, the judgment of the district court awarding attorney's fees to Perry is AFFIRMED IN PART, VACATED IN PART AND REMANDED.

## APPENDIX H

Section 2 of the 1871 Civil Rights Act, 17 Stat. 13 (emphasis supplied).

"That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, *or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified*, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, *or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws*, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giv-

ing his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Appendix I

EXCERPTS FROM

Bertram Perry vs. Evelyn Falkowski, et. al.

C. A. N. 78-PT-0935-A

MEMORANDUM IN SUPPORT OF EVELYN FALKOWSKI'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND TO AMEND

The Amended Complaint states as its fifth claim for relief that defendant Falkowski violated the federal wiretapping act, 18 USC §2510, et seq....

An inescapable conclusion from the record established in this case is that Bertram Perry's claims against Evelyn Falkowski are without basis and were brought in bad faith.

....

Senator Hart, in speaking on exemptions in §§ 2511 2(2)(c) and (d) as adopted, clarified:

> ...we propose to prohibit a one-party consent tap, except for law enforcement officials and for private persons who act in a defensive fashion. Such one party consent is also prohibited for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him.... Nor does it prohibit such recordings in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortion or

other unlawful or injurious uses by the other party.

Title III as finally enacted provides at Section 2511(2):

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added)
>
> (b) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act. (emphasis added)

The meaning of "injurious act" as used in §2511(2)(d) of the Statute can be resolved as a matter of law by a study of its legislative history. Injury which is a by-product of lawful pursuit of one's own rights is not prohibited. 2 U.S. Code Cong. & Admin. News, 90th Cong. 2d Sess. 2182 (1968).

It is established law in the fifth circuit that recording a conversation to which one is a party does not violate either statutory or constitutinal rights of the United States. Evidence from such recordings is admissible. (Citations omitted)....

An eighth circuit case has discussed the "injurious purpose" language of the §2511(2)(d) exemption. It holds that "injury" which is a by-product of lawful pursuit of one's own rights is not the kind of "injurious purpose proscribed, and that recordings in such circumstances are admissible. Meredith v. Gavin, 446 F. 2d 794, 798 (CA 8, 1971).

The Supreme Court in U. S. v Caceres, 47 LW. 4349, 99 S.Ct. 1465 (1979) held that federal statutes impose no restrictions on recording a conversation with the consent of one of the conversants; for the purpose of protecting the credibility of the consenting conversant, even in violation of a regulation of a federal agency.

In Morton v. Ruiz, 415 U. S. 199 (1974) the Supreme Court held that rules affecting individual rights and obligations are substantive, or "legislative-type" rules, id. at 236. These must be rooted a grant of such power by Congress and subject to limitations which that body imposes. Bat-

terton v. Francis, 432 U.S. 416, 425 n. 9 (1977).

...The EEOC, or any other agency, has no power to prohibit an employee from protecting his or her credibility, or in the words of Senator Hart, the agency cannot "prohibit such recordings...when the party acts out of a legitimate desire to protect himself and his own conversatins from later distortion or other unlawful or injurious uses by the other party." It is a matter of record that Bertram Perry distroted the conversation that was recorded when he reported the incident. He doesn't deny it....

MOTION TO AMEND

Ms. Falkowski further requests that this court amend its decision of April 17, 1981 by discussing the claims of Bertram Perry against Ms. Falkowski to the same extent that her counterclaims were discussed in the court's decision. Particularly in view of the history of this dispute, it is submitted that a discussion of the claims for relief asserted against Ms. Falkowski, to the same extent that the counterclaims were discussed would provide balance...by an exposition of the Wire Tap Act, 18 USC §§2510, et seq, comparable to the discussion herein of that statute.....OWEN E. PERRY...April 25, 1981.

## Supplement 1975-1981

**400 FS 409 (Perry v Golub, 1975)**

s464 FS 1016
s 74 FRD 360

Cir. 4
c447FS$^{3}$973

Cir. 7
431 FS 142

**464 FS 1016 (1978)**

v599 F2d 1052
s400 FS 409
s 74 FRD 360

Cir. 2
487 FS$^{2}$ 340

487 FS$^{3}$ 343

**74 FRD 360 (1976)**

s 400 FS 409
s 464 FS 1016
84 FRD 162

Cir. 9
617 F2d$^{7}$ 1370

## January 1983 Supplement

**400 FS 409 (Perry v Golub, 1975)**

Cir.D.C.
665 F2d$^{1}$1328

Cir. 6
511 FS$^{6}$683

**464 FS 1016 (1978)**

Cir. 5
518 FS 58
11 ALR F 316s

**74 FRD 360 (1976)**

Cir. 2
94 FRD$^{7}$615

Cir. 8
87 FRD$^{1}$ 91

Cir. 9
679 F2d$^{7}$158
NM
96 NM 210
629P2d 286
55ALR F 193n

## ARGUMENT

Petitioner contends (Pet. 5-10) that the court of appeals erred in vacating the orders of the district court as moot. Petitioner contends that because of "collateral legal consequences" of "district court findings imputing criminal activity" to petitioner (Pet. 3), the court of appeals should have either reviewed the findings of the district court or summarily reversed them. This contention is without foundation.

Petitioner asserts (Pet. 6) that two decisions of the district court, the November 1978 decision (Pet. App. 6a-22a) and the 1975 issuance of a preliminary injunction in Mr. Perry's action (Pet. App. 58a-80a), impute criminal conduct to her. Specifically, petitioner asserts, without citation, that she was found guilty by the district court of "purposely failing conciliation of cases in order to increase the business of attorneys friendly to her" (Pet. 8). In fact, nothing in either decision can be construed as a finding of criminal activity. The 1978 decision does state that petitioner acted intemperately and violated an internal EEOC guideline (Pet. App. 13a-14a). The 1975 decision quotes the testimony of an EEOC official to the effect that petitioner engaged in conduct that had been characterized as an abuse of authority (Pet. App. 64a). The 1975 decision also notes Perry's charge that petitioner gave instructions to "fail conciliation" (Pet. App. 61a), but only in the context of a decision whether to issue a preliminary injunction, not as a conclusive finding on the merits. Indeed, the court specifically stated that it

was "not passing on the propriety or impropriety of the District Director's actions" (Pet. App. 60a n.3). Thus, petitioner errs in characterizing the district court's decision as a civil case "in which a party is found to be guilty of criminal conduct" (Pet. 7).

Moreover, the decisions below involve no collateral consequences militating against a finding of mootness. In a criminal case, collateral consequences, such as a bar against owning a firearm, may well flow from a conviction. See, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Here, however, petitioner points to no collateral legal consequence other than a vague assertion that the district court decision will have an adverse effect on petitioner's ability to defend a civil damages suit that has been brought by Mr. Perry (Pet. 8-9). Particularly in light of the court of appeals' statement that the dismissals for mootness were "so as to spawn no consequences" (Pet. App. 26a), this assertion is speculative at best. Finally, to the extent that petitioner claims to be harmed by the district court's 1975 decision (Pet. App. 58a-80a), that decision is not part of the case below and is not subject to further review. It was vacated by the district court's 1976 decision (Pet. App. 27a-46a), which was affirmed by the court of appeals on April 25, 1979 (Pet. App. 25a-26a). No petition for certiorari was filed from that decision.

Apart from the alleged collateral consequences, petitioner does not dispute that the causes of action underlying the decision below are moot. This determination was made by the court of appeals in its

April 1979 decision, which has not been challenged, and it is in accord with the decisions of this Court. See *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Alejandrino* v. *Quezon*, 271 U.S. 528 (1926). When a legal controversy has ended, it is a waste of judicial resources to require an appellate court to review findings of a district court simply because one party is unhappy with those findings. Such a result would be at odds with the principles underlying the mootness doctrine.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980

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